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COMPENSATION AS GOVERNING DAMAGES IN ACCESSION.—Since on strict theory the owner of a chattel tortiously taken and improved by the wrongdoer still has the right to the property so long as its identity remains, it follows that he should be entitled to recover it specifically, unless it has been so changed that it is in fact no longer the thing which he had owned. In order, however, that the tort-feasor shall not be punished out of all proportion to the offense committed, and the owner of the property repaid far more than the fullest compensation could require, it has come to be established that title to the chattel taken, at some earlier point in the process whereby the wrongful taker, either by the addition of materials, or perhaps by the expenditure of labor and skill, is changing and improving it and multiplying its value, shall pass to the taker, and become no longer subject to recaption.¹ This doctrine of title by accession being, then, but a protection against excessive punishment, it would seem that its shield should be sooner extended where the tortious act was done in ignorance and innocently, than in cases of deliberate or malicious wrong. Such a distinction in effect exists, though the reasons for it are seldom clearly formulated, in the tendency of the court to hold that a change which will be deemed to destroy the identity of the property if the taking was in good faith, will be ineffectual to do so in favor of an intentional trespasser.² Perhaps nowhere can there be found better proof of the fairness of the principle underlying this tendency than in the practical injustice of its most noteworthy exception, the New York doctrine permitting specific recovery from a wilful taker even after the identity of the thing originally taken has been completely lost, and regardless of all increase in value, no matter how great, nor in what proportion due to the efforts of the wrongdoer.³ This doctrine seems quite unjustifiable except on the assumption that no retribution can be too severe for such a case.

Although even the general rule with regard to recaption may often work hardship in depriving one who has trespassed in good faith of any compensation for an increase in value due to his industry, this seems to be an unavoidable incident to the original owner's undoubted right to recover his property,⁴ but where the latter elects to bring an action for damages rather than for the chattel itself, this dilemma is not presented, for the court may award the original owner the value of his property at the time of conversion, and still permit the trespasser to retain the additional value created by his improvements. This solution has been generally accepted where the taking is in good faith and with color of title;⁵ but where the taking is in bad faith, damages to the full extent of the improved value of the property

¹ Bl. Com. 404, 481; *Pulcifer v. Page* (1851) 32 Me. 404; *Wetherbee v. Green* (1871) 22 Mich. 311; *Carpenter v. Lingenfelter* (1894) 42 Neb. 728.

² *Sutherland, Damages*, § 102.

³ *Silisbury v. McCoon* (1850) 3 N. Y. 379. But see Chief Justice Bronson's opinion on a former trial of the same case, (1847) 4 Denio 332, 337, in which he states as his personal opinion that the owner of property should either reclaim it before the new possessor has greatly increased its value or else he should be restricted to a remedy by action for the damages which he has sustained.

⁴ *Railroad Co. v. Hutchins* (1881) 37 Oh. St. 282, 293; see also *Weymouth v. Chicago & N. W. Ry. Co.* (1863) 17 Wis. 567, 571.

⁵ *Beede v. Lamprey* (1888) 64 N. H. 510; *Winchester v. Craig* (1876) 33 Mich. 205.

may be recovered in most jurisdictions;⁶ and even an innocent purchaser is held liable for any enhancement in value due to improvements by the trespasser.⁷ But since the original owner is fully compensated for his loss if he receives the value of his property at the time it is taken,⁸ or, if he has suffered any special damages, may allege and recover them as such,⁹ it seems that the enhanced value of the property may be awarded only on the theory of punitive damages.¹⁰ If this is so, the ordinary rules governing the award of punitive damages should be followed, and it should rest solely in the discretion of the jury, taking into consideration all the circumstances of each case, to decide how heavy a penalty is advisable.¹¹ It is error, therefore, for the court to hold as a matter of law that where property has been wilfully taken and improved by the wrongdoer, the entire enhanced value may be recovered as punitive damages. This view may probably be explained, though not justified, by a desire to prevent a wilful trespasser from gaining any benefit from the goods he has converted; but there appears to be no reason of justice why an innocent third party, who has given full value for the property, should be forced to pay exemplary damages for his vendor's wrongful act.¹² It is urged, indeed, that by the ordinary rule of damages he must pay the value of the goods at the time he converted them by his purchase of them from the wrongdoer,¹³ but this result can only be reached on the theory that the original owner is entitled, not only to the goods themselves, but to their enhanced value besides. But, as has been suggested, the only reason why, in retaking the property, he gets the increase in value, is the impossibility of restoring the chattel to its original form. If, as it seems justifiable to assume, the value of the goods at the time of the conversion is not an arbitrary standard of damages, but is simply the measure best adapted to compensate the owner,¹⁴ the latter should clearly recover no greater proportion of such value than at that time he is in fact entitled to. Being then entitled as of right to no more than the original value of the property, he should recover no more than that in damages.

The fairness of this result, in contrast to a rule which would authorize the recovery from the innocent purchaser as a matter of law of damages greater than those for which his vendor would have been liable, has apparently not been without its influence. In the recent case of *Wall v. Holloman* (N. C. 1911) 72 S. E. 369, timber belonging to the plaintiff was converted in good faith, and the court permitted him to recover only its value immediately after severance, with interest. The result reached, it is submitted, is correct; but the reasoning of the court in apparently distinguishing between wilful and innocent trespasses seems open to criticism.

⁶*Everson v. Sellar* (1885) 105 Ind. 266.

⁷*Nesbitt v. St. Paul Lumber Co.* (1875) 21 Minn. 491; *Wooden-ware Co. v. United States* (1882) 106 U. S. 432.

⁸*Glasby v. Cabot* (1883) 135 Mass. 435.

⁹*Bodley v. Reynolds* (1846) 8 Q. B. 779.

¹⁰See *Fisher v. Brown* (1895) 70 Fed. 570, 572.

¹¹1 Sedgwick, Damages, § 387.

¹²*Fisher v. Brown supra*; *Railroad Co. v. Hutchins supra*.

¹³*Pine River Logging Co. v. United States* (1901) 186 U. S. 279; *Nesbitt v. St. Paul Lumber Co. supra*; *Wooden-ware Co. v. United States supra*.

¹⁴*Railroad Co. v. Hutchins supra*, 294.